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# **Administrative Guidance and Cartel in Regulated Industries**

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**Headquarters for Competition Law & Policy**

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The views expressed in this paper are those of the author and do not necessarily reflect the views of Korea Fair Trade Commission

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## **I. Introduction**

In the early 1960s, Korea began to pursue government-led export-oriented industrialization. At the time, Korea was an underdeveloped country with per capita income of 78 USD ranking among the lowest in the world. Not only was the economy small with lacking natural resources, but also the market itself was not fully established. Against this backdrop, the government adopted a "five-year economic development plan" in 1962, under which it focused on fostering and supporting designated industries to replace imports while promoting exports. As a result, large businesses and public companies belonging to the designated industries received preferential treatments under the government's financial and industrial policies which allowed them to become *chaebols* and giant public companies of today. In the 1960s, the government nurtured labor-intensive industries based on cheap rural labor and foreign investment, and in the 1970s, it fostered the heavy chemical industry focusing on increasing exports. These efforts enabled Korea to achieve rapid economic growth within a short period of time with an increased presence in the international community.

During the period of intensive growth in the 1960s and 70s, the government enacted 'special laws' to implement a comprehensive regulation on large businesses and public companies in certain industries with regards to their market entry, business activities and market exit as a means of supervision and monitoring, in return for its support to them. Korea's regulated industries can be classified into four categories of the energy industry including electricity, coal, oil and gas, the transportation industry including railroad and airplane, the communication and broadcasting industry including telegraph, telephone and broadcasting, and the financial industry including banking, insurance and securities. The regulatory authorities overseeing these industries may take authoritarian administrative actions provided in the 'special laws', but they tend to resort to non-authoritarian administrative guidance to regulate those industries under the 'special laws' due to unclear or lack of a legal basis attributable to general and abstract statutes.

Such a regulation, including administrative action and guidance, might have had rationality and legitimacy at the time of the enactment of the 'special laws', but as Korea shifted from a government-led economy to a private sector-led economy, it became necessary to comprehensively review the purpose and content of the regulation. In this regard, it is only natural that there have been contradictions and conflicts between

regulations under the special law on regulated industries and competition policy since the introduction of the Monopoly Regulation and Fair Trade Act (hereinafter, the "Monopoly Regulation Act" or the "Act") in the 1980s, which represent Korea's transition to a private-sector led economy.

Administrative guidance, widely used for regulated industries in Korea and Japan, is a very convenient administrative tool as long as the companies in regulated industries give consent. However, there were many instances where cartels were formed in the course of regulatory authorities' consent solicitation from the enterprisers in regulated industries or where enterprisers created cartels on the pretext of administrative guidance. The competition authority of Korea has made great efforts to resolve competition law issues arising from highly anti-competitive activities such as cartels which are closely linked to administrative guidance. Nevertheless, the regulatory authorities have prioritized fostering of regulated industries and regulations to that end, and regarding cartel-inducing administrative guidance, both the regulatory authorities and concerned enterprisers might have neglected the importance of competition principles in all regulated industries.

Taking these into consideration, this paper aims to propose a direction for cartel regulation with respect to the relationship between administrative guidance and cartel in regulated industries.

For this, this paper will look at the relationship between administrative guidance and cartel in Korea's regulated industries, State Action Doctrine and related cases in the U.S., the KFTC's deliberations and cases in relation to regulation of administrative guidance-related cartels and direction of cartel regulation regarding administrative guidance.

## **II. Administrative Guidance and Cartel**

### **1. Administrative Guidance in Regulated Industries**

An administrative guidance refers to a non-authoritarian real act conducted by an administrative body to realize its objective in expectation of its counterpart's voluntary cooperation, which is implemented also in various other names such as order, recommendation, request, caution and warning. The strength of administrative guidance lies in that it does not require legal basis and allows efficient realization of

administrative objectives without the burden of legal responsibility on the part of the administrative body. It is also easy to secure compliance from the concerned counterpart. On the other hand, administrative guidance does not coincide with the principle of responsible administration, for the government is not held accountable for negative consequences of an administrative guidance. In addition, in case a practice involving an administrative guidance ends up limiting competition, enterprisers in compliance with the administrative guidance will be subject to sanctions under the Monopoly Regulation Act, unless its act is considered "legitimate under the law." This will only increase distrust toward the government. Regardless of administrative guidance's usefulness as an effective means of achieving administrative goals, administrative guidance must be employed within the boundary set by the constitutional principles, the Administrative Procedure Act and public law theories<sup>1</sup>.

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<sup>1</sup> Administrative guidance must be used to the minimum necessary for achieving certain objective and cannot be forced against the will of the counterpart (Clause 1, Article 48 of the Administrative Procedure Act). It must be implemented within the business of the concerned administrative body. Administrative guidance on matters under the authority of other administrative bodies is illegal, and it must be in line with the rules of the positive law and the general principles of the administrative law (e.g. principle of proportionality and principle of equality).

In some cases, application of the Monopoly Regulation Act, in relation to various regulations provided by ‘special laws’ on regulated industries, is completely excluded or partially excluded for specific practices. A number of regulations exist in each regulated industry as follows.<sup>2</sup>

In the energy industry, the Minister of the Ministry of Commerce, Industry and Energy limits market entry of electricity and coal businesses and decision-making on pricing and terms of trade of electricity and oil businesses. In addition, the Minister can devise an energy supply and demand program to guarantee stable supply and demand of energy and take measures to adjust supply and demand in preparation for an emergency.

In the transportation industry, the Minister of the Ministry of Construction and Transportation regulates market entry by mandating enterprisers wishing to enter the auto transportation or scheduled air transportation business to get a license. Transport operators must decide their fare and charge according to the standards and rates set by the Minister and get permission or notify to the authority.

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<sup>2</sup> Ohseung Kwon, *Economic Law*, Bubmunsa Publishing Co., 2004, pp. 149-151

In the case of telecommunications business, the Minister of the Ministry of Information and Communication holds a broad regulatory authority over wide-ranging matters, from market entry to decisions on pricing and terms of trade. Telecommunications business is divided into facility-based telecommunications business, special category telecommunications business and value-added telecommunications business. For a new facility-based telecommunications service provider to enter the market, it has to get the Minister's permission. Meanwhile, a new special category telecommunications service provider must register with the authority and a new value-added telecommunications service provider must notify the authority of its market entry. Facility-based telecommunications service providers are required to notify the Minister of its rates and adhesion contracts for service. The Ministry of Information and Communication has established Korea Communications Commission, an affiliate, to create an environment for fair competition in telecommunications business, to deliberate on issues related to protection of telecommunication service users' rights and to arbitrate disputes between service providers.

In the financial industry, those wishing to engage in banking business must get permission from the Financial Supervisory Commission while those wishing to enter

insurance business must get an approval from the Minister of the Ministry of Finance and Economy. Banks are subject to the Monetary Policy Committee's control when determining their interest rates and other fees on loans and savings or the upper limit of reserves.

Since the Korean economy began to be led by the private sector, the government's market intervention has been greatly reduced through privatization of public companies and deregulation, including in regulated industries. However, privatization of public companies led to formation of private monopolies. Consequently, the monopolistic/oligopolistic market structure remains unchanged apart from the fact that they have different owners, and there are still doubts over the effectiveness of the reform of regulations on regulated industries. Despite the efforts to provide transparent and predictable administrative service through enactment of the Administrative Procedure Act and expansion of information disclosure, invisible regulation imposed through administrative guidance still has a significant influence over regulated industries.

## **2. Relationship between Administrative Guidance and Cartel**

Administrative guidances are closely linked to cartels since they normally go beyond the original intention to result in constraining market competition and are targeted on multiple enterprisers within regulated industries. The following types of administrative guidance are considered to have high potential to create cartels.

First, administrative guidance requesting price adjustment (increase or decrease) or maintenance (refraining from price competition), proposing adjustment scope or demanding enterprisers organization to collect and report price data is highly likely to trigger price cartels (Article 19, (1)-1, the Act).

Second, administrative guidance mandating enterprisers to set their own quota for production, production facility or transaction volume is highly likely to lead to creation of cartels restricting production, delivery, transportation or transaction of goods or services (Article 19, (1)-3, the Act).

Third, administrative guidance fixing sales area or customers for each enterpriser or mandating enterprisers to do so themselves is highly likely to lead to cartels limiting the territory of trade or customers (Article 19, (1)-4, the Act).

Fourth, there are also cases when enterprisers take advantage of the administrative guidance and reach a separate agreement to form a cartel.

Cartel is an act of creating market dominance like a monopolistic enterpriser through collusion among enterprisers, who should otherwise be in competition. It is the biggest evil in the market as it forecloses competition, which is one of the basic principles of a market economy.

Since the enactment of the Monopoly Regulation Act in 1981, the KFTC has continuously regulated cartels, and in particular since assuming the status of an independent organization in 1996, the KFTC has been putting more emphasis on strengthening its efforts to identify and correct cartels. As a result, in the last 11 years, from 1996 to 2006, the KFTC's corrective action against cartels increased six-fold from the period from 1981 to 1994 (from 46 cases to 279 cases). The number of cartel cases

the KFTC referred to the Prosecutors' Office has soared as well since 2003 (15 out of 26 cases).

Of the total surcharge of 450.2 billion won the KFTC imposed in the last three years (from 2004 to 2006), 388.6 billion won (86.3 percent) was imposed in cartel cases. The surcharges imposed on cartels since the enactment of the Monopoly Regulation Act till 2006 amounts to 862.2 billion won, which accounts for 61.5 percent of the total surcharge of 1.3782 trillion won. The surcharges imposed on cartel participants in the last seven years since 2000 take up 88 percent of the total surcharge imposed since surcharge was introduced for cartel cases in 1986.

### **III. State Action Doctrine and Related Cases**

#### **1. State Action Doctrine**

The "State Action" Doctrine, derived from "Parker v. Brown, 317 U.S.341, 63 S.Ct.307(1943) Case, exempts qualifying state and local government regulation from

federal antitrust, even if the regulation at issue compels an otherwise clear violation of the federal antitrust laws.<sup>3</sup> In order for an act to be recognized as a state action, the act in question must be conducted by appropriate authorization. The subject of the authorization is the state government itself, and authorization by a lower branch of city or other state government is not exempted. Although the authorization method includes comprehensive authorization, exemption is not granted to an act that is against the original intent of the authorization, even if it was conducted within the scope of the authorization. Authorization is about granting of an authority not about the government's coercion of an act. Therefore, the government's coercion is not necessarily required for an exemption to be granted. The existence of the government's coercion can provide evidence for two conditions for exemption, clear purpose and sufficient supervision, but the very existence of coercion does not guarantee exemption.

According to the State Action Doctrine, exemption from the competition law can be given to a violation of the law among enterprisers that can be viewed as a state action in substance. In "California Retail Liquor Dealers Association v. Midcal Aluminum,

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<sup>3</sup> Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, Third Edition, Thomson/West, 2005, p.739

Inc.(Midcal)," the U.S. Supreme Court pointed to two requirements for exemption from Sherman Act; (1) the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," and (2) the policy must be 'actively supervised' by the state itself.<sup>4</sup>

The 'Midcal's first requirement that the challenged restraint be "one clearly articulated and affirmatively expressed as state policy" to replace competition with regulation means that the state has authorized departure from free market competition.

The second 'Midcal's requirement ensures that state action immunity "will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies."<sup>5</sup>

## **2. Related Cases**

(1) Parker v. Brown (1943)

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<sup>4</sup> Section of Antitrust Law, American Bar Association, 2005 Annual Review of Antitrust Law Developments, pp.259-260

<sup>5</sup> Patrick v.Burget, 486 U.S. 94, 100-01(1988)

The Supreme Court upheld a California statute that limited the production of raisins by California farmers, with allocation decisions made by private participants in the industry, supervised by state officials.<sup>6</sup> The Supreme Court found that the framers of the Sherman Act of 1890 never intended to the statute to undermine the regulatory power of state and local governments to displace competition in certain markets by creating regulatory regimes of various kinds.<sup>7</sup>

(2) *Goldfarb v. Virginia State Bar* (1975)<sup>8</sup>

In a case that involved a county bar association that set the lower limit for the standard fee scale and disciplined those who received fees lower than the standard limit, the Supreme Court ruled the bar association in violation of the Sherman Act and denied Parker immunity for the following reason. The state bar association was doing business under the general authority granted by the state Supreme Court, which has the ultimate

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<sup>6</sup> *Parker v. Brown*, 317 U.S.341, 63 S.Ct.307(1943), note at 350-352, 63 S.Ct. at 313-315

<sup>7</sup> *Hervert Hovenkamp*, *Antitrust*, Thomson/West, Fourth Edition, p.332

<sup>8</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2n 572(1975)

authority to control and supervise lawyer discipline. Since the State court did not demand a specific standard for the lowest fee, it cannot be said that the State government demanded price-fixing as an entity exercising its sovereignty. And although the bar association, in some aspects, appears as a public organization under the State government, it is basically a group comprised of private-sector officials in pursuit of its economic gains.

(3) *Ticor Title Ins., FTC.* (1992)<sup>9</sup>

In a case where title insurance companies colluded on fee rates for register search, survey and settlement services in a system under which rates, set by the Insurance Rate Commission, take effect as long as the State government's insurance agency does not express disapproval within certain period of time after being reported by the Insurance Rate Commission, the Supreme Court did not recognize an exemption from the Sherman Act on the grounds that the State government's supervision was insufficient. In light of the fact that the responsible agency of the State was not active in reviewing the rates, it cannot be considered that nonperformance meant actual approval and it is also

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<sup>9</sup> *Ticor Title Ins. Co., F.T.C. v.*, 504 U.S.621, 112 S.Ct.2169, 119 L.Ed.2d 410(1992)

insufficient to say that just the very existence of a possibility of supervision was a substitute for the State's actual decision-making.

#### **IV. Administrative Guidance-Related Cartel Regulation in Regulated Industries**

##### **1. The KFTC's Deliberations**

The Monopoly Regulation Act stipulates prohibition of cartels among enterprisers in Article 19 and prohibition of cartels by enterprisers organization in Article 26. Cartels are exempted from the Monopoly Regulation Act if they are formed by legitimate actions taken pursuant to statutes other than the Monopoly Regulation Act as stipulated in Article 58 of the Act.

Article 19 (1) of the Monopoly Regulation Act provides that "no enterpriser shall agree with other enterprisers by contract, agreement, resolution, or any other means to jointly engage in an act, or let others do this kind of activities, falling under any of the following subparagraphs, that unfairly restricts competition (hereinafter referred to as

"improper concerted acts"). Article 19 (5) is a provision on presumption of cartel stipulating "where two or more enterprisers are committing any acts listed in the subparagraphs of paragraph (1) that practically restrict competition in a particular business area, they shall be presumed to have committed an improper concerted act despite the absence of an explicit agreement to engage in such act."

In addition, Article 26 (1)-1 prohibits any enterprisers organization's act of unfairly restricting competition including acts falling under any subparagraph of Article 19 (Prohibition of Improper Concerted Acts) (1).

Article 58 (Legitimate Actions Taken Pursuant to Acts and Subordinate Statutes) provides that "this Act shall not apply to the legitimate acts of an enterprise or an enterprisers organization conducted in accordance with any Act or any decree to such an Act."

With regards to cartel regulations related to administrative guidance, the KFTC first judges whether a cartel was formed among enterprisers or by an enterprisers organization and then decides whether Article 58 is applicable to it.

Regarding administrative guidance-related cartels, the KFTC operates a provision stipulating exemption from Article 58, which is granted only to "acts following administrative guidance based on specific statutes" which are considered "legitimate acts conducted pursuant to statutes". Related deliberations by the KFTC include the following.

(1) Cartel of 12 agricultural companies (corrective order imposed in June 1999)

Although it is recognized that the Ministry of Agriculture and Forestry proposed to the National Agricultural Cooperative Federation (NACF) in advance the price increase rate of agriculturals the NACF purchases, the KFTC presumed that the respondents colluded on the price of individual agricultural product irrespective of the administrative guidance citing the existence of price consultation among the respondents and the fact that the respondents proposed same price at the individual price negotiation.

(2) Prohibited act by Korean Study Materials Association (corrective order and surcharges imposed in May 2005)

The Ministry of Culture and Tourism issued an administrative guidance instructing study materials publishers to refrain from raising prices, but enterprisers only took advantage of this and agreed on a price higher than the price recommended by the administrative guidance. Since there is no causal relationship between this price cartel and the administrative guidance, it is considered an improper concerted act.

(3) Cartel of two telecom operators (corrective order and surcharges imposed in August 2005)

The Ministry of Information and Communication issued administrative guidance instructing two telecom operators to adjust rates and market share (in November 2002), and after about six months, in June 2003, enterprisers agreed on some of the matters included in the guidance. The KFTC recognized illegality of this act, on the following grounds; ① there is no causal relationship between the administrative guidance and the cartel, for enterprisers objected to the administrative guidance right after its issuance,

the date of agreement and its content do not coincide with the administrative guidance and the Ministry of Information and Communication deny any link between the administrative guidance of November 2002 and the enterprisers' collusion of June 2003, ② the administrative guidance itself has no statutory basis, and thus, acts in compliance with the guidance cannot be viewed as a "legitimate act conducted in pursuant to statutes (Article 58)" and ③ administrative guidance carries no de facto binding force.

## **2. Cases**

The Court strictly recognizes the scope of "legitimate actions taken pursuant to statutes" stipulated in Article 58 of the Monopoly Regulation Act. Such acts are acknowledged to the minimum required within the scope of the law recognizing specific exceptions to free competition or orders issued under the law. Instructions without legal basis, acts with legal bases but outside the scope of instruction or acts conducted by public organizations other than government ministries are not acknowledged.

### **1) Prohibited act by Judicial Scriveners' Society**

The Supreme Court clearly indicates the concept of "legitimate actions taken pursuant to statutes" provided by Article 58 of the Monopoly Regulation Act, which serves as an important standard for interpretation of Article 58 of the Act.

The law the above provision mentions refers to the law that specifically recognizes exceptions to free competition in businesses where competition restriction is considered legitimate due to the extraordinary nature of the business or where enterprisers' monopolistic position is guaranteed by the official permission while intensive public regulation is needed for the sake of public interest or to orders issued under the law.

The minimum required acts conducted within the scope of the above statute will be considered legitimate actions taken in pursuant to statutes (Supreme Court's sentence on May 19, 1997, Decision No. 96NU150).

2) Judicial Scriveners' Society's act of restricting business activities of its member

The Supreme Court said that Judicial Scriveners' Society's act of limiting its member enterprisers' registration service fee, does not qualify as a legitimate action stipulated by Article 58 of the Monopoly Regulation Act.

In a case in which the Korea Judicial Scriveners Association limited its member enterprisers' registration service fees, the very existence of provisions on prohibition of attracting commissioned work, duty of loyalty, duty to maintain professional dignity, duty to comply with the rules of the Association and duty to share expenses under the Certified Judicial Scriveners Act is not sufficient to prove that enactment and enforcement of the "rules on handling of group registration for apartment and condominium" are legitimate acts stipulated by Article 58 of the Monopoly Regulation Act (Supreme Court's sentence on May 19, 1997, Decision No. 96NU150, original sentence on November 23, 1995, Decision No. 94GU32186)

3) Cartel by six wholesale corporations of Garak-dong Agricultural & Marine Products Market in Seoul

The Seoul High Court said that the Korea Agro-Fisheries Trade Corporation's act of deciding terms of trade or ordering wholesalers to collectively set terms of trade is an act over which the Korea Agro-Fisheries Trade Corporation has no authority under the relevant law, and thus does not qualify as a legitimate act under Article 58 of the Monopoly Regulation Act.

Even if the Korea Agro-Fisheries Trade Corporation ordered wholesalers to directly or collectively decide the terms of consignment fee or subsidies, the act cannot be considered legitimate under Article 58 of the Monopoly Regulation Act because the Korea Agro-Fisheries Trade Corporation, which manages the wholesale market, has no authority to directly decide or order the consignment fee rates or subsidy rates, over which the wholesale market corporation has authority, according to the intent of Article 58 of the Monopoly Regulation Act and related provisions (Act on Distribution and Price Stabilization of Agricultural and Fishery Products) (Seoul High Court's sentence on May 12, 2004, Decision No. 2003NU5817, settled with the plaintiff's abandonment of appeal).

#### 4) Cartel of 11 non-life insurance companies

If enterprisers reached a separate agreement on price prior to administrative guidance or did so taking advantage of administrative guidance, they are considered to have engaged in a cartel. It is wrong to believe that administrative guidance itself eliminates the illegitimacy of a cartel.

Regarding a case where 11 non-life insurance companies collectively raised the basic premium to 3.8 percent on average from August 1, 2000, it is difficult to say that the companies engaged in a cartel despite the fact that the companies increased premium to 3.8 percent on average (the premiums range from 3.2 percent to 4.3 percent) based on the Financial Supervisory Service's administrative guidance (with an intention not to permit plaintiffs' request for approval of an increase of the loading premium to more than 3.8 percent.....), because it is insufficient to prove that the plaintiffs reached a separate agreement on the above premium increase rate among themselves prior to the administrative guidance or that they reached a separate agreement to take advantage of

the administrative guidance and raise the premium by the same rate (Supreme Court's sentence on January 28, 2005, Decision No, 2002DU12052, Seoul High Court's decision on October 17, 2002, Decision No. 2001NU10716).

### **3. Direction of Cartel Regulation Regarding Administrative Guidance**

Administrative guidance in regulated industries still plays an important role. In case an administrative guidance does not meet the conditions of Article 58 of the Monopoly Regulation Act, the KFTC has strictly regulated cartels through administrative guidance and has accumulated many related cases. In this respect, it has become necessary to ask other regulatory authorities to refrain from using anti-competitive administrative guidance by enhancing the transparency and predictability of regulations on cartels related to administrative guidance in addition to preventing enterprisers from taking advantage of administrative guidance to engage in cartels. Upon this recognition, the KFTC has prepared the "Guidelines on review of cartels related to administrative guidance" (December 27, 2006).

The Guidelines are applied to cartel cases involving administrative guidance but not to cartels where administrative actions are involved according to the statutes of administrative agencies. When other statutes have given specific authority to an administrative agency allowing it to impose administrative actions on enterprisers regarding competition factors such as price, enterprisers' price cartel can be exempted from the application of the Monopoly Regulation Act in accordance with Article 58 (Legitimate Actions Taken Pursuant to Acts and Subordinate Statutes) of the Act. The Guidelines give separate provisions for cases where an administrative agency issued an administrative guidance inducing agreement among enterprisers and cases where other types of administrative guidances are involved.

(1) Cases where an administrative agency issued an administrative guidance inducing agreement among enterprisers

An administrative agency is considered to have induced an agreement among enterprisers when it made an administrative guidance instructing enterprisers to raise or lower prices at an appropriate level through an agreement of the business and when price increase rate was agreed at a meeting of government officials and enterprisers.

Even if a cartel was created as a result of an administrative agency's administrative guidance inducing enterprisers' agreement without any specific statutory basis, the cartel is illegal in principle.

Nevertheless, in case other statutes specifically permit acts stipulated in Article 19, (1)-1 of the Monopoly Regulation Act or allow administrative agency's administrative guidance against a cartel, exemptions from the application of the Monopoly Regulation Act is granted based on Article 58 of the Act when the administrative guidance's purpose, means, content and method are in compliance with the foundation statute and enterprisers' action was within the scope of the administrative guidance.

(2) Cases when an administrative agency individually issued an administrative guidance on enterprisers

In case of an administrative agency's individual issuance of an administrative guidance on each enterpriser, enterprisers are considered to have formed a cartel when they reach a separate agreement on matters provided in Article 19, (1)-1 of the Monopoly Regulation Act taking advantage of the guidance. Examples could include a case when enterprisers separately agree on the price increase rate of 5 percent in response to an administrative agency's administrative guidance instructing to increase the price by less than 5 percent and a case when enterprisers agree on the price increase rate prior to an administrative guidance and jointly respond to the guidance afterwards. In addition, when enterprisers, after being issued individual administrative guidance, hold a meeting and collectively decide whether to accept the guidance and which procedures or methods of implementation to follow, their act is highly likely to be considered illegal depending on the content, nature and significance of the agreement among enterprisers.

In case each of the enterprisers individually followed the administrative guidance, it is not considered as a cartel. One example is when price and other terms of transaction of enterprisers were formed similarly as a result of administrative agency's de facto approval of each enterpriser's price level.

## **V. Conclusion**

There is a need to conduct an overall review of various regulations in regulated industries, especially cartel-inducing administrative guidance, that were introduced in the past era of government-led economic development as we have now entered an era of private sector-led market economy. Regulatory authorities are now capable of collecting vast amount of information real-time through ex ante regulations and also have superior technical regulation capacity. In addition, they are accumulating experience and expertise in consumer protection issues peculiar to the concerned industry. Meanwhile, the competition authority is superior in terms of the economic theory-based market analysis capacity, including evaluation of anti-competitiveness, and competition law enforcement experience.

Considering the difference between the competition authority and regulatory authorities in terms of expertise, it will be desirable to have regulatory authorities oversee technical regulations while the competition authority handles competition law enforcement. Sometimes, administrative guidance is inevitable in regulated industries and regulatory authorities may be tempted to use it as well. However, it is desirable for each regulatory

authority to refrain from using administrative guidance as much as possible. When it is inevitable to issue an administrative guidance for the sake of achieving policy goals, there must be legal basis for it. Moreover, the policy objective of replacing market competition and its expected result must be clearly proposed. It should also mobilize clear methods, rather than unofficial means, and be careful not to induce agreements among enterprisers. The administrative guidance must be confined to the minimum scope needed to achieve its goal.

Even in the case of administrative guidance instructing enterprisers to agree on price based on specific statutes, it should guard against the possibility of a separate agreement among enterprisers that go beyond the scope of the statute and the administrative guidance.

When a regulatory authority issues an administrative guidance which induces a cartel agreement among enterprisers, enterprisers must not follow the guidance as it is. They must closely review whether the regulatory authority has the legal authority to induce a cartel agreement and whether there is a special circumstance making it inevitable to follow the guidance. In addition, enterprisers must not take advantage of the

administrative guidance to discuss among themselves whether to accept the guidance and the implementation procedure, method and content of it through a separate agreement. Even if a regulatory authority makes an administrative guidance, enterprisers must individually decide whether to comply with it or not.

Technological development and increased variety of consumer demand have blurred the line between industries leading to acceleration of convergence between different industries, for instance between communication and financial sectors, between communication and broadcasting sectors and between traditional and new industries, making it all the more urgent to clarify the role of the regulatory authorities and the competition authority. To minimize the cost of regulation enforcement and compliance, the role must be clearly divided between the two authorities and suppress introduction of overlapping regulations to the maximum. Since it will be impossible to completely remove the grey area between the competition authority and regulatory authorities, close cooperation between the two authorities, for example through regular consultation meetings, is critical to maintain policy consistency among different ministries in the grey area. Moreover, a written standard needs to be established to oversee the exchange of human resources and mutual relationship between the two.